85-891

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1985

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, Deceased, MICHAEL CORY AUSTIN, Deceased, and PHILLIP LEE AUSTIN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Manza, Moceri, Gustafson & Messina, P.S.

By: Michael S. Manza
John S. Glassman

Counsel of Record

P. O. Box 9216
Tacoma, WA 98409-0216

QUESTIONS PRESENTED

1. Is a resident of Western Washington, who sues the United States in his District under the Federal Tort Claims Act, effectively denied due process of law under the Fifth Amendment when the District Court orders, and the Ninth Circuit Court of Appeals ratifies, a transfer of the litigation to the Western District of Texas, at the request of the United States, absent the required showing that the convenience of parties and witnesses, in the interest of justice, would be served?

2. Should this Honorable Court declare, to insure constitutional due process of law, under the circumstances described in the question above, that a

litigant against the United States is entitled to an immediate appeal as a matter of right to the Circuit Court of Appeals?

LIST OF PARTIES

All of the parties appearing in the litigation at United States District Court level for the Western District of Washington are identified in the caption of this Petition.

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NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1985

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, Deceased, MICHAEL CORY AUSTIN, Deceased and PHILLIP LEE AUSTIN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Warren E. Burger,

Chief Justice of the United States

Supreme Court, and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner, Roger C. Smith, respectfully requests this Court to issue a Writ of Certiorari and review the Order (9th Circuit No. 85-3695) dismissing his appeal for lack of jurisdiction; and the Order (9th Circuit No. 85-7090) denying his Petition for Writ of Mandamus and Request for Permission to Appeal pursuant to 28 U.S.C. 1292(b), both dated June 28, 1985; and the Order denying his Motions for Reconsideration.

OPINIONS BELOW

The Orders of the District Court, and of the Ninth Circuit Court of Appeals, Cause Nos. 85-3695 and

85-7090, are reprinted in Appendices A, B, C, D, E, pp. A-1-6, to this Petition.

JURISDICTION

The Orders of the Ninth Circuit sought to be reviewed are dated June 28, 1985. Reconsideration was denied August 23, 1985 (no. 7090) and _____ _____, 1985 (no. 3695). The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, amend. V, provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. §1346(b) provides in part:

> Subject to the provisions of chapter 171 of this title, the district courts, . . .

shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1402(b):

Any civil action on a tort claim against the United States under sub-section (b) of Section 1346 of this Title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U.S.C. §1404(a) provides in part:

For convenience of parties and witnesses, in the interest of justice, a district court

> may transfer any civil litigation to another district where it might have been brought . . . .

28 U.S.C. §1291 provides in part:

> The Court of Appeals shall have jurisdiction of the appeals from all final decisions of the District Courts of the United States, ... except where a direct review may be had in the Supreme Court. . . .

STATEMENT OF THE CASE

A. Basis of Jurisdiction in the District Court

Jurisdiction is based in the Western District of Washington pursuant to 28 U.S.C. §1346(b) and 28 U.S.C. §1402(b).

B. Statement of Facts Material to the Questions Presented

On December 20, 1982, James Austin, on active duty with the United States Army, and his wife, Valerie, resided in

military housing at Fort Hood, Texas, with six minor children.

Three of the children, Shannon, Phillip and Michael Austin, were born of the marriage, and three others, namely, Rebecca L., Patrick A. and David R. Smith, were born to Valerie Austin of a prior marriage.

On February 14, 1984, claims were filed with the United States Government, Department of the Army, for damages arising from the alleged wrongful deaths of Valerie, Phillip, and Michael Austin on December 20, 1982, as a result of a fire in housing provided by the United States Government.

Roger C. Smith, natural father of Valerie Austin, is the personal representative of the estates of Valerie,

Phillip and Michael Austin, and is the adoptive father of Rebecca, Patrick and David Smith.

Elenor Smith, natural mother of Valerie Austin, and wife of Roger C. Smith, died in late July, 1985.

The United States did not respond to these claims within six months and, under the Federal Tort Claims Act, were deemed denied. 28 U.S.C. §1346(b).

On November 9, 1984, an action was filed in the Western District of Washington (D.C. No. C84-725T) on behalf of the estates of Valerie, Phillip, and Michael Austin; Roger and Elenor Smith; and Rebecca, Patrick and David Smith. At all times material hereto, Roger C. Smith, as well as Rebecca, Patrick and

David Smith, were residents of the Western District of Washington.

C. Summary of Proceedings Below

On February 1, 1985, the United States moved, pursuant to 28 U.S.C. §1404(a), to transfer this cause to the Western District of Texas. The Affidavit of Susan L. Barnes (Assistant United States Attorney) is contained in Appendix F, pp. A-7-11.

On February 7, 1985, the District Court granted Defendant's Motion to Transfer the lawsuit to the Western District of Texas. Appendix A, pp. A-1-2.

On February 19, 1985, Roger C. Smith filed Notice of Appeal, Petition for Permission to Appeal Pursuant to 28 U.S.C. §1292(b), Petition for Writ of

Mandamus, and Motion to Stay Proceedings, in the Court of Appeals for the Ninth Circuit.

On June 28, 1985, a panel of the Ninth Circuit denied Smith's Writ of Mandamus and other relief. Without explanation or a hearing, the Court of Appeals ruled that the District Court did not abuse its discretion in ordering transfer. Appendix C, pp. A-4.

On the same day, the same panel also dismissed Smith's appeal for lack of jurisdiction, citing Varsic v. U.S. Dist. Ct., 607 F.2d 245 (9th Cir. 1979). Appendix B, pp. A-3.

On July 9, 1985, Smith filed Motions for Reconsideration, which were denied. Appendices D, E, pp. A-5-6.

The Barnes' Affidavit does not disclose the name, location, proximity, or address of any person who has knowledge of facts in this case, or who might be a witness on the issue of either liability or damages, nor does it set forth the nature of the expected testimony of witnesses, if any, on behalf of the United States.

The United States does not evidence any hardship should the case remain in the Western District of Washington, nor does it specify the extent to which any witness would be inconvenienced in the interest of justice.

Roger C. Smith submitted the affidavits of John L. Messina, one of his attorneys, Bonnie Baker, Ph.D., a

clinical psychologist, and his own. Appendices G, H, I.

The proof submitted by claimant Smith shows hardship, prejudice and inconvenience by detailing the names, location, proximity and address of the Plaintiff's witnesses and the inconvenience and financial burdens which would be imposed upon them and him.

STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The District Court and the Circuit Court of Appeals denied Claimant due process of law under the Fifth Amendment, and, therefore, access to the said Courts in two particulars:

> (1) by not requiring presentation of facts by the United States establishing the claimed inconvenience of parties and witnesses, in the interest of justice;

(2) by denying Smith an appeal as a matter of right under these circumstances.

I. THE UNITED STATES DID NOT MEET THE REQUIREMENTS FOR A TRANSFER OF VENUE

The Federal Courts have established the requirements for a transfer under 28 U.S.C. §1404(a).

Factors, Etc., Inc., et al. v. Pro Arts, Inc., et al., 579 F.2d 215 (2d Cir. 1978), held that the moving party must specify the key witnesses and submit a synopsis of their testimony before the required showing is made.

Terkeurst v. USA, 549 F.Supp. 455 (W.D. Mich. 1982), is particularly appropriate. Decedent was killed in an airplane crash in Idaho. A wrongful death action was brought against the

United States in Michigan where his widow resided.

The United States requested that the action be transferred to Idaho. In denying the motion for change of venue, the District Court said:

> In support of its [transfer] request, the Government contends that the following factors justify this change of venue: (1) The plane crash occurred in Idaho; (2) The law applicable to this action under the Federal Tort Claims Act is Idaho law; (3) The "vast majority of witnesses" are located in Idaho; and (4) The aircraft wreckage is located in Idaho.
>
> Plaintiff contends that the government has failed to establish that it would suffer hardship or otherwise be inconvenienced by not transferring the case to the District of Idaho. In support of her argument, plaintiff refers to Richards v. Upjohn Co., 406 F. Supp. 405, 406-407 (E.D. Mich. 1976) for the proposition that a defendant must point to a

"specific hardship" such as the number of witnesses who would be inconvenienced or unwieldy equipment that would have to be moved.

* * *

Defendants allegation of inconvenience is not supported by particulars in the form of proof or affidavits and, therefore, "cannot be accorded much weight in balancing conveniences." (citations omitted). In fact, defendant does not even allege a hardship if venue remains in Michigan. Although the government states that the "vast majority" of witnesses reside in Idaho, it does not specify the actual number of witnesses, the nature of their testimony, nor the extent to which they would be inconvenienced. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L.Ed. 1055 (1947), the court stated:

> It is often said that the plaintiff may not, by choice of an inconvenient form, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not

> necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. (Emphasis added).

Id. at 508.

The District Court in the case at bar did not require compliance with the above criteria of Gulf Oil Corp, above, and thereby denied Roger C. Smith due process of law.

The undeniable fact that both in Terkeurst, and in the instant case, the United States chose not to make the constitutionally required showing, causes one to reflect on the extent of this practice.

II. THE REQUIREMENTS OF DUE PROCESS OF LAW

Jones v. Walt Disney World Co., 409 F.Supp. 526, 529 (1976), states:

> Guidance for the decisional process and an enumeration of the relevant considerations are provided in Schneider v. Sears, 265 F.Supp. 257, 263 (S.D.N.Y. 1967):
>
> > "The court's discretion under section 1404(a) is broader than the forum non conveniens doctrine, but the criteria applicable under the statute are substantially those developed under the older doctrine. These include: (1) the convenience to parties; (2) the convenience of witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems indicating where the case can be tried more expeditiously and

> inexpensively; and (7) the interests of justice, a term broad enough to cover the particular circumstances of each case, which in sum indicate that the administration of justice will be advanced by a transfer." (Footnotes omitted).

In evaluation of these considerations, two procedural points must be remembered. First, the burden is on the movant to furnish proof clearly and substantially in favor of the proposed transfer. City of New York v. General Motors Corporation, 357 F.Supp. 327 (S.D.N.Y. 1973). Second, the proof must be furnished otherwise than by affidavits which are merely conclusory. Sinclair Oil Corporation v. Union Oil Co. of California, 305 F.Supp. 903 (S.D.N.Y., 1969). (Emphasis added).

In Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 952 (9th Cir. 1968), the Court stated:

> Venue provisions deal with rights too important to be denied review.
>
> * * *
>
> To require litigants to await final judgment serves to defeat the very purpose of the venue rule by requiring them to submit to the disadvantages from which the rule is designed to relieve them.
>
> * * *

In Varsic v. U.S. Dist. Ct., 607 F.2d 245, 252 (9th Cir. 1979), the Court found that when a plaintiff, proceeding in forma pauperis, is required to prosecute an action three thousand miles from his home, he will suffer prejudice in a way which Congress explicitly attempted to prevent by statute. "Even if he is able later to appeal any unfavorable judgment, this prejudice can never be corrected." Id.

III. BY WHAT METHOD SHOULD A LITIGANT PROCEED IN SEEKING REVIEW?

The present methods of obtaining appellate review of a transfer order under the circumstances of this case deny due process of law.

There are ostensibly three means for seeking reivew of transfer orders:

(1) Under 28 U.S.C. §1292(b), provided the District Court makes the requisite certification, and the Court of Appeals allows the appeal;

(2) If the appellate court grants a writ of mandamus under the All Writs Statute, 28 U.S.C. §1651;

(3) The "Cohen Rule", of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949), makes final, and thus appealable under 28 U.S.C. §1291, certain orders:

> This decision appears to fall in that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeney, 1 Pet. 567, 579; United States v. River Rouge, 269 U.S. 411, 414; Cobbledick v. United States, 309 U.S. 323, 328. (Emphasis ours).

The inadequacy of 28 U.S.C. §1292(b) is the statutory requirement that no appeal is available unless the District Court makes the requisite certification which, as a practical matter, is extremely unlikely where the Court grants a transfer order.

The constitutional inadequacy of mandamus is the standard used, namely, abuse of discretion, which varies widely among the circuit courts of appeals in its application. See, A., infra p. 23.

Furthermore, an appellate court cannot apply an abuse of discretion standard unless it has before it, from the trial court, the constitutionally required compelling showing needed for an informed decision.

The "Cohen Rule" is inadequate for two reasons: (1) No Court of Appeals has approved its use in transfer cases; (2) The "rule" where used has been applied inconsistently.

The "Cohen Rule" could be resorted to in situations as here before the

Court where the United States did not attempt to present the detailed facts necessary to the fulfillment of due process of law.

The Ninth Circuit in Pence, at 952, n. 8, noted that the Cohen rule could cast doubt on the rule against the appealability of §1404(a) orders.

The rationale underlying both the Cohen rule and the holding in Pence is that transfer orders can work substantial prejudice to a party that cannot be remedied by an appeal from the final judgment.

A. THE CIRCUIT COURTS OF APPEAL DIFFER ON ISSUING WRITS OF MANDAMUS TO REVIEW TRANSFER ORDERS

The Third and the Sixth Circuits appear unwilling to review transfer orders by mandamus. All States

Freight, Inc. v. Modarelli, 196 F.2d 1010 (3d Cir. 1952); Ratke v. Picard, 283 F.2d 945 (6th Cir. 1960), cert. den. 364 U.S. 927 (1960).

The District of Columbia Circuit has ruled that, where grounds for transferring a cause are insufficient to support the order and bring it within the terms of the statute authorizing transfers, such order of transfer may be reviewed in light of criteria customarily associated with mandamus. Wiren v. Laws, 194 F.2d 873 (D.C. Cir. 1951).

The same court will not review a transfer decision via mandamus where the District Court considered the convenience of parties and witnesses in

the interests of justice. Loews v. McGuire, 205 F.2d 719 (D.C. Cir. 1953).

The First Circuit will review for "clear-cut abuse of discretion" where an action is transferred to another district. In Re Josephson, 218 F.2d 174 (1st Cir. 1954).

The Second Circuit will issue mandamus in extraordinary circumstances to correct the disposition of a transfer motion by the district court. A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, and 443 (2d Cir. 1966).

The Eighth Circuit will offer relief by way of mandamus where abuse of discretion is claimed only to relieve against "manifest judicial arbitrariness." McGraw-Edison Co. v. Van Pelt, 350 F.2d 361 (8th Cir. 1965).

The Fourth, Fifth, Seventh, Ninth and Tenth Circuits have considered petitions for mandamus, and have reversed, usually under compelling facts, and for abuse of discretion. General Tire & Rubber Co. v. Watkins, 373 F.2d 365 (4th Cir. 1967) cert. den., 386 U.S. 960 (1967); Atlantic Coast Line R.R. v. Davis, 185 F.2d 766 (5th Cir. 1950) (Court of appeals had jurisdiction to issue writ of mandamus and set aside order re-transferring the case.); Chicago, R.I. & P. R.R. v. Igoe, 22 F.2d 299 (7th Cir. 1955), cert. den. 350 U.S. 822 (1955) (Judge abused his discretion in refusing to transfer the action.); Pacific Car & Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968)(Venue provisions deal with

rights too important to be denied review.); Cessna Aircraft Co. v. Brown, 348 F.2d 689 (10th Cir. 1965).

B. ONLY THIS HONORABLE COURT CAN REAFFIRM AND RESTORE THE NEED FOR DUE PROCESS OF LAW IN TRANSFER CASES

Due process of law requires that transfers of venue be supported by detailed particulars which compel the need for a change in order to achieve the convenience of witnesses and parties, in the interest of justice.

A plaintiff in a suit against the United States is entitled to substantial deference in his choice of forum as part of the fundamental right of access to the courts established in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803), which held that due process of law is not an empty notion,

rather it requires a practical construction in fulfillment of its remedial goals.

Mathews v. Eldridge, 424 U.S. 319, 333 (1976), stated the following as to the nature of due process of law:

> These decisions underscore the truism that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.C. 2593, 2600, 33 L.Ed.2d 484 (1972).

* * *

CONCLUSION

A decision to transfer the venue of a case to a district requested by the

United States as the Defendant under the Federal Tort Claims Act denies due process of law as required by the Fifth Amendment to the Constitution when no precise and detailed factual justification for the change of venue is presented by affidavits under oath which manifestly require such change.

In the situation here presented to this Honorable Court, the only precise, detailed, factual presentation by affidavits is made by the Claimant, Roger C. Smith. Consequently, the ultimate result of the transfer and the refusal of the Circuit Court of Appeals to consider the merits of the transfer, is to allow the Defendant United States in a Federal Tort Claims action to

choose the forum for the trial based upon its own desires.

This result is not intended by the Federal Tort Claims Act and, particularly, is not allowed by the due process of law clause contained in the Fifth Amendment to the Constitution of the United States.

Respectfully submitted this 18th day of November, 1985.

MANZA, MOCERI, GUSTAFSON
& MESSINA, P.S.

By: Michael S. Manza
Michael S. Manza

By: John S. Glassman
John S. Glassman
Counsel of Record

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROGER C. SMITH, et al.,	)	
Plaintiff,	)	NO. C84-725T
-vs-	)	
UNITED STATES OF AMERICA,	)	ORDER
Defendant.	)	

THIS MATTER comes on before the above-entitled Court upon the Motion of the United States for Change of Forum.

Having considered the entirety of the records and file herein, it is now

ORDERED that the Motion of the United States is GRANTED, and this lawsuit is hereby transferred to the Western District of Texas.

The clerk of the court is instructed to send uncertified copies of this Order

to all counsel of record, and to transfer this matter to the clerk of the court for the Western District of Texas.

DATED this 7th day of February, 1985.

Jack E. Tanner
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, deceased, et al.,	No. 85-3695
Plaintiffs-Appellants,	DC# CV-84-725 T Western Washington
vs.	ORDER
UNITED STATES OF AMERICA,	
Defendant-Appellee.	

Before: GOODWIN, SKOPIL and NORRIS, Circuit Judges

The appeal is dismissed for lack of jurisdiction. See Varsic v. United States District Court, 607 F.2d 245 (9th Cir. 1979).

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, deceased, et al.,	)	No. 85-7090
Petitioner,	)	DC# CV-84-725 JET Western Washington
vs.	)	ORDER
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,	)	
Respondent,	)	
and	)	
UNITED STATES OF AMERICA,	)	
Real Party in Interest.	)	

Before: GOODWIN, SKOPIL and NORRIS, Circuit Judges

Petitioner's application for a writ of mandamus and for other relief filed on February 19, 1985, is denied. The

district court did not abuse its discretion in granting the motion to transfer.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, deceased, MICHAEL CORY AUSTIN, deceased, and PHILLIP LEE AUSTIN, deceased,	)	NO. 85-7090
Plaintiffs-Appellants,	)	CD# CV 84-725 JT Western Washington (Tacoma)
vs.	)	ORDER
UNITED STATES OF AMERICA,	)	
Defendants-Appellee.	)	

Before: GOODWIN, SKOPIL and NORRIS, Circuit Judges

Appellant's motion for reconsideration of this court's denial of a writ of mandamus and permission to appeal under 28 U.S.C. § 1291(b) is denied.

APPENDIX E

Smith's motion for reconsideration under Ninth Circuit Cause number 85-3695 is still pending.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROGER C. SMITH, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	NO. C84-725T AFFIDAVIT OF SUSAN L. BARNES

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

SUSAN L. BARNES, being first duly sworn on oath, deposes and says:

1. I am an Assistant United States Attorney for the Western District of Washington and represent defendant United States of America which seeks to transfer this case to the Western District of Texas.

2. The accident giving rise to this action occurred on December 20, 1980, at Fort Hood, Texas, which is in the Western District of Texas.

3. None of the operative facts pertaining to this action occurred within the State of Washington.

4. As appears from the pleadings, this case will involve determination of various questions of Texas law.

5. The testimony of most of the material witnesses who would be called on behalf of the United States are beyond the reach of the processes of this Court. They are subject, however, to the process of the United States District Court for the Western District of Texas, and all said witnesses reside much closer to the Western District of Texas than to Tacoma, Washington.

6. The approximate distance the witnesses residing in Texas would have to travel to attend court here is 2100 miles. It is readily apparent that a trial of this action in this Court would be excessively expensive to the United States and excessively burdensome to its necessary witnesses when compared with a trial in the Western District of Texas.

7. Justice will be promoted by transferring this cause to the Western District of Texas for the reasons that the defendant will have a far better opportunity of having present the witnesses whose testimony will be essential to his presentation; that a trial of this action here at Tacoma would be excessively expensive to the United States and would unduly and unjustly burden it when compared to the much lesser expense

of a trial in Texas; that both parties would be able to compel attendance of witnesses in the Texas court, whereas virtually none of the United States witnesses are subject to process of this Court; that necessary expenditures of time and resulting burdens to the witnesses would be far less if the case is tried in Texas; and that the interest of justice would best be served by having the Texas court apply Texas tort law in this case.

8. January 15, 1984, I talked with David Gentry of the Administrative Office of the United States Courts, Statistical Analysis and Reports Division. He stated that the median time from the filing of a suit to disposition in the Western District of Washington is eight

months. The same time period for the Western District of Texas is six months.

SUSAN L. BARNES
Assistant United States Attorney

SUBSCRIBED AND SWORN to before me this 17th day of January, 1985.

s/_____
NOTARY PUBLIC in and for the
State of Washington, residing
at Renton

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, deceased, MICHAEL CORY AUSTIN, deceased, and PHILIP LEE AUSTIN, deceased,	CIVIL ACTION NO. C84-725T
Plaintiff,	AFFIDAVIT OF JOHN L. MESSINA IN OPPOSITION TO MOTION FOR CHANGE OF VENUE
vs.	
UNITED STATES OF AMERICA,	
Defendant.	

STATE OF WASHINGTON)
) ss.
County of Pierce)

John L. Messina, being first duly sworn on oath, deposes and says:

1. That he is one of the attorneys representing Plaintiffs above named and makes this Affidavit in opposition to Defendant's Motion to Change Venue.

2. The following expert witnesses have been retained by the Plaintiffs to testify at the trial:

(1) Lloyd Scott is an expert in fire investigation and safety. He resides at 6507 Sierra Drive S.E. in Lacey, Washington, a distance of approximately 25 miles from the Federal Courthouse in Tacoma. It is estimated that the following additional costs will be incurred by the Plaintiff to have Mr. Scott testify in Texas:

Round Trip Air Fair	$ 816.00	
Hotel Accommodations	130.00	(two nights)
Per Diem	90.00	(three days)
Travel and waiting time	400.00	(16 hours at $25.00 per hour)
Total:	$1,436.00	

(b) Dieter Jahns is a human factors expert from Lynden, Washington. Lynden

is located north of Tacoma, Washington approximately 100 miles. The estimated additional cost of Mr. Jahns testimony if this case were transferred to Texas would be the following:

Round Trip Air Fair	$ 816.00	
Hotel Accommodations	130.00	(two nights)
Per Diem	60.00	(two days)
Additional travel time	480.00	(16 hours at $30.00 per hour)
Total:	$1,486.00	

(c) Providing the Plaintiffs' economic loss evaluation will be Eugene Silberberg, Ph.D., from Seattle, Washington. Dr. Silberberg is a professor at the University of Washington, which is approximately 40 miles from the Federal Court in Tacoma. The additional expense of having Dr. Silberberg testify in Texas is estimated to be the following:

Round Trip Air Fair	$ 816.00	
Hotel Accommodations	130.00	(two nights)
Per Diem	60.00	(two days)
Additional Travel and Waiting Time	1,680.00	(16 hours at $105.00 per hour)
Total:	$2,686.00	

(d) Bonnie Baker, Ph.D., will testify about the psychological impact on the survivors. Dr. Baker is from Spokane, Washington; a distance of approximately 300 miles from Tacoma. Dr. Baker has previously evaluated the surviving children living with the maternal grandparents/adoptive parents, Mr. and Mrs. Smith. Plaintiffs estimate the additional expense of asking Dr. Baker to testify in Texas to be the following:

Round Trip Air Fair	$ 700.00	
Hotel Accommodations	65.00	(one night)
Per Diem	30.00	(one day)

Additional Witness Fee	560.00	(8 hours at $70.00 per hour)
Total:	$1,355.00	

3. Dr. Baker has recommended that the children begin psychological/psychiatric counseling and therapy to help them deal with their grief and other problems stemming from the loss of their mother and half-brothers. The process of selecting a Tacoma area psychologist qualified and competent to deal with the adolescent grief process has begun. It is anticipated that the treating psychologist will be testifying in trial and the additional expense to the Plaintiffs will be as follows:

Round Trip Air Fair	$ 816.00	
Hotel Accommodations	130.00	(two nights)
Perdiem	90.00	(three days)
Additional Witness Fee	1,200.00	16 hours at $75.00 per hour)

Total: $2,236.00

4. In addition to the expert and medical witnesses, the Plaintiff and the surviving children will testify. The children are: David, age 13; Patrick, age 12; and Becky, age 10. The cost to fly one adult to Austin, Texas, is approximately:

Round Trip Air Fair	$ 816.00	
Hotel Accommodations	130.00	(two nights)
Food	90.00	(three days)
Total:	$1,036.00	

The estimated expense of sending the three surviving children to Texas is $1,000.00, assuming the children will be sharing hotel accommodations with their maternal grandparents/adoptive parents.

5. The lay witnesses who will be testifying for the Plaintiff at trial, all reside within the Tacoma, Washington

area. These witnesses, yet to be selected, will include: several teachers and friends of the children from Brookdale Elementary School located in Tacoma, Washington; several neighbors residing in the immediate vicinity of Mr. and Mrs. Smith at 14104 So. C Street in Tacoma, Washington; fellow members of Mr. and Mrs. Smith's church, the Kingdom Hall, 14002 So. C Street, Tacoma, Washington; Hannelore McKenna, a friend of the decedent, Valerie Lynn Austin, residing at 1629 So. Wheeler Street in Tacoma, Washington and the decedent, Valerie Lynn Austin's, surviving brother and sister who also reside in the Tacoma, Washington area.

6. Plaintiff Roger C. Smith and his wife are retired and attempting to provide for themselves and three young

children on a retirement income which had been planned for two. The expense of sending all the expert, medical, lay witnesses and others to the State of Texas for trial, would be an extreme financial burden on the Plaintiffs.

7. The Assistant United States Attorney, in her Affidavit, does not identify any of the witnesses to whom she is referring, nor does she discuss or disclose their availability, knowledge, testimony or location.

8. My office has thoroughly investigated this claim. Many of the military personnel, if not all, who have relevant knowledge on the issues in this case, have been transferred out of Fort Hood and are stationed at other Army installations.

9. The only parties residing in Texas, who might be witnesses in this case, are the Deptartment of the Army fire employees and others who may have knowledge of the troop movements, which blocked an emergency fire vehicle, on the date of the three decedents' deaths. Therefore, the U.S. Attorney has identified no person who is unavailable as a witness in the State of Washington.

10. In addition, all the relevant witnesses are either military personnel or federal employees and will certainly cooperate with the government in presenting its case in the State of Washington.

11. Your affiant is aware that guest housing is available on post at Ft. Lewis for government witnesses, which is

approximately 15 miles from the Federal Courthouse in Tacoma.

12. Similarly, the Government is under contract with certain commercial airlines for reduced rates, assuming military transportation is unavailable.

13. On January 21, 1985, Plaintiff propounded Plaintiffs' First Interrogatories and Request for Production to Defendants. See, attached cover and signature page. These Interrogatories, in part, ask the United States to identify all persons who have knowledge of liability or fault or knowledge as to the issue of damages. Further, these Interrogatories ask the United States to identify any expert witnesses they have retained, their educational and professional backgrounds and any opinion that they have with regard to this case.

Further your affiant sayeth naught.

John L. Messina

SUBSCRIBED AND SWORN to before me this 28 day of January, 1985.

s/_____
NOTARY PUBLIC in and for the
State of Washington, residing
at Federal Way

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, deceased, MICHAEL CORY AUSTIN, deceased, and PHILIP LEE AUSTIN, deceased,	
Plaintiffs,	NO. C84-725T
vs.	
UNITED STATES OF AMERICA,	
Defendant.	

AFFIDAVIT UPON ORAL EXAMINATION OF
BONNIE SUE BAKER, Ph.D.,
BY TELEPHONE CONFERENCE CALL

APPEARANCES:
For the Plaintiffs:

LINDA L. HOLMLY
MONZA, MOCERI, GUSTAFSON
& MESSINA
4218 South Steele Street
Tacoma, Washington

Reported by Valerie Gerjets
January 25, 1985

4218 South Steele Street,
Tacoma, Washington

1:10 p.m.

* * * * * *

BONNIE SUE BAKER, Ph.D., having been called as a witness on behalf of the plaintiff, being first duly sworn by the Notary, testified as follows:

MS. HOLMLY: This is a sworn statement, an affidavit, that is going to be taken telephonically of Dr. Bonnie Baker, who is in Spokane at this time, in the oral presence of Val Gerjets, Notary Public in and for the State of Washington.

DIRECT EXAMINATION

BY MS. HOLMLY:

Q Dr. Baker, do you understand that this is an affidavit or a sworn statement upon questions being propounded to you by me and that your answers are being recorded?

A Yes, I do.

Q Would you please state your full name and your business address.

A Dr. Bonnie Sue Baker, Sixth Avenue Medical Building, Suite 800, West 508 Sixth Avenue, Spokane, Washington, 99204.

Q Would you please give us a brief description of your education and your professional experience?

A Yes. I have a Ph.D. from Washington State University in the area of social psychology. I have a Masters Degree in clinical social work from the University of Washington in 1967. I have worked in the field of counseling and psychotherapy for 17 years, sometimes full time, sometimes part time. I have also taught

courses at Eastern Washington University and at Washington State University.

I presently have a full-time private practice in Spokane, Washington, where I see primarily children and families, as well as some women, for counseling.

Q Have you been retained by this law firm as an expert in the Austin versus United States case?

A Yes, I have.

Q Have you met the surviving Smith children and their adoptive parents, Mr. and Mrs. Smith?

A Yes, I have.

Q When was that?

A I met with them upon two occasions. The first occasion was on 7-20-84 at the Smith residence, and the second

occasion was on 11-15-84, also at the Smith residence.

Q How much time did you spend with the family on those two occasions?

A On the first occasion, I spent approximately 2 hours and 30 minutes with the family, and on the second occasion, I spent -- if you will give me a minute. I need to review my notes.

Q That is fine.

A I spent five hours, approximately five hours, with the parents and then also with the children that day.

Q Are you going to be meeting with them again in the future?

A That is possible.

Q Did you meet them at their home?

A I met them at the Smith home, yes.

Q From your evaluation of the surviving children and their adoptive parents, do you have any opinions as to the effect the moving of this trial to Texas will have on this family?

A Yes I do. I think that moving the trial will be very difficult for the children because it will mean that they will have to go to Texas, and I think this is going to be emotionally damaging to the children because it is going to pull them away from the only security they have been able to establish since the death of their mother.

The children are very emotionally bonded to their grandparents. They are very financially dependent upon them as well as emotionally dependent upon them. This will also pull them

away from school friends, from their normal everyday routine. In addition to this, the Smiths, after discussing their financial situation with me, do not appear to be in a financial position where they could afford to travel with the children and be with them during this time. So this will probably put the children in Texas in a foster home or something of that sort, and I think this could be very damaging to the children.

The other thing I would like to mention on that is that when children are asked to recall information from a traumatic incident, such as the one that took place when they lost their mother, it is almost like asking children to go back and relive the experience. This is very difficult

for children to do, and it is extremely important that the children have their entire support system present when they are asked to do this kind of thing.

In other words, it would be more difficult for the children to have to go back through this information and be asked questions when they do not have the support of having the Smith's there, the support of having the normal, everyday routine: being able to go to school, associate with friends, that type of thing.

Q When you met with the family, did they discuss their church activities with you?

A Yes, they did.

Q Do you think the difficulty that they will face being in Texas and being

away from their church is going to have any impact on them?

A Yes, I do. This is a very religious family, Assembly of God, and they take their religious views very seriously. The family prays together every day. They attend church on a regular basis. The children are being brought up in that particular faith, and I think it will be difficult for the children to be separated from their church as well as the time that they spend with their grandparents praying, talking about their religious views, and other types of religious activities.

Q- Based on your experience, education, and knowledge, and your information about this family, you think that

going to Texas would be detrimental to these children?

A Yes, I do.

MS. HOLMLY: Thank you very much, Dr. Baker.

THE WITNESS: You are welcome.

* * * * * * *

(Witness excused at 1:15 p.m.)

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROGER C. SMITH, as Personal Representative of the Estates of VALERIE LYNN AUSTIN, deceased, MICHAEL CORY AUSTIN, deceased, and PHILIP LEE AUSTIN, deceased,	)	CIVIL ACTION NO. C84-725T
Plaintiff,	)	AFFIDAVIT OF ROGER C. SMITH
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STATE OF WASHINGTON)
) ss.
County of Pierce)

Roger C. Smith, being first duly sworn on oath, deposes and says:

I am the natural grandfather and Personal Representative of the Estate of Valerie Lynn Austin, Michael Corey Austin and Philip Lee Austin. I reside

at 14104 South C Street, Tacoma, Washington with my wife, Elinor Ann Smith.

On November 17, 1983, my wife and I adopted Rebecca Lynn Dean, Patrick Allen Dean and David Ray Dean, who are the surviving children of our deceased daughter, Valerie Lynn Austin.

I retired from 29 years of Federal Civil Service in August of 1979 with a grade of WS-10. At this time, my monthly retirement take home pay is slightly over $1,100.00. On this amount, I support myself, my wife, and the three children. The savings my wife and I had after my retirement have been substantially depleted since we have assumed responsibility for the care of David, Patrick and Becky.

In the past few years, my wife has suffered from a series of serious health

problems which has precluded my seeking re-employment to supplement the family's retirement income.

My family is actively involved in our church and we attend church meetings several times per week, unless precluded by illness.

Travel to Texas would be very burdensome, not only financially, but also in terms of my wife's health, and disruption of the lives of our children.

Further affiant sayeth naught.

Roger C. Smith

SUBSCRIBED AND SWORN to before me this 26th day of January, 1985.

NOTARY PUBLIC in and for the State of Washington, residing at Roy.

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-891

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROGER C. SMITH, ETC., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES OF AMERICA, REAL PARTY IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES OF AMERICA, REAL PARTY IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this wrongful death action, petitioner contends that the court of appeals erred in letting stand the district court's order transferring the case pursuant to 28 U.S.C. 1404(a).

1. On December 20, 1982, petitioner's daughter and two grandchildren died as a result of injuries sustained in a fire that occurred in their military housing at Fort Hood, Texas. Two years later, petitioner filed the instant action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the Western District of Washington, the district where he lives.

Pursuant to 28 U.S.C. 1404(a), the United States moved to transfer the case to the Western District of Texas. In support of this motion, the government filed an affidavit

(Pet. App. A8-A12) stating why transfer was warranted for the convenience of the parties and witnesses and in the interest of justice. Specifically, the affidavit stated: (1) the accident giving rise to the action occurred in the Western District of Texas, and no operative events pertaining to the action occurred in Washington; (2) resolution of the case would require the application of Texas law; (3) the majority of the government's material witnesses would not be amenable to service of process in the Western District of Washington, but would be amenable to process in the Western District of Texas, and all of them lived much closer to Texas than Washington; (4) both parties would be able to compel the attendance of witnesses in the Western District of Texas; and (5) trial of the action in the Western District of Washington would be excessively expensive and burdensome to the United States. The district court granted the government's motion on February 7, 1985 (*id.* at A1-A2).

Petitioner then filed a notice of appeal, a petition seeking permission to appeal the district court's interlocutory order pursuant to 28 U.S.C. 1292(b), and a petition for a writ of mandamus. The court of appeals denied relief. The court summarily dismissed petitioner's appeal for lack of jurisdiction, citing *Varsic* v. *United States District Court,* 607 F.2d 245 (9th Cir. 1979) (Pet. App. A3), and held without elaboration that "[t]he district court did not abuse its discretion in granting the motion to transfer" (*id.* at A4-A5).

2. Petitioner contends that the court of appeals erred in refusing to set aside the district court's order transferring this case to the Western District of Texas. This factbound claim does not merit this Court's review. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

Petitioner argues that the district court should have required the government to make a more elaborate showing

that the transfer was justified. This is a curious argument given that 28 U.S.C. 1404(a) requires no showing by either party and, indeed, on its face allows sua sponte transfers.[1] In any event, the district court had before it the government's motion for transfer, supported by affidavit, as well as petitioner's opposition thereto, also accompanied by affidavits, and "the entirety of the records and file" in the case (Pet. App. A1). There was ample support in those materials—involving, as discussed earlier, not only convenience for witnesses but other factors as well—to sustain the district court's decision to grant the transfer. The court of appeals properly found no abuse of discretion in the district court's decision and, accordingly, denied petitioner's appeal and application for a writ of mandamus.

a. The court of appeals' disposition of petitioner's appeal is in accord with settled law. It is well established that orders respecting venue entered under Section 1404(a) are interlocutory in character and are nonappealable as of right prior to final judgment. See, *e.g.*, *Pacific Car & Foundry Co.* v. *Pence*, 403 F.2d 949, 951 (9th Cir. 1968) (collecting cases).[2] It is true that when a controlling question of law is involved the district court may certify a transfer order for review under 28 U.S.C. 1292(b) and, upon certification,[3] the appellate court may in its discretion permit an appeal. But a party has no right to demand that a court authorize

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[1]See, *e.g.*, *I-T-E Circuit Breaker Co.* v. *Becker*, 343 F.2d 361, 363 (8th Cir. 1965); *Stanley Works* v. *Globemaster, Inc.*, 400 F. Supp. 1325, 1338-1339 (D. Mass. 1975); *Kearney & Trecker Corp.* v. *Cincinnati Milling Machine Co.*, 254 F. Supp. 130, 133-134 (N.D. Ill. 1966).

[2]See also 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.147, at 1694-1695 (1985) (collecting cases) [hereinafter cited as *Moore's Federal Practice*]; 9 *id.* at ¶ 110.13[6], at 173-174; 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3855, at 301 (1976 & Supp. 1985) (collecting cases).

[3]This certification was apparently never made in this case. See Appellant's Br. 3.

appeal under Section 1292(b). The issue petitioner presented was hardly a "controlling question of law * * * advanc[ing] the ultimate termination of the litigation." To the contrary, it merely involved application of the discretionary standard of Section 1404(a) to the particular facts of this case.

b. Petitioner also contends that the court of appeals should have granted a writ of mandamus. In the transfer order context, however, this Court has held that "[t]he supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power.' " *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953) (denying mandamus to override 28 U.S.C. 1406(a) transfer order) (quoting *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)). While the courts of appeals may differ as to what constitutes an "exceptional case," they all have been extremely chary of finding an abuse of discretion.[4]

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[4]See 1 *Moore's Federal Practice* ¶ 0.147, at 1708 (footnote omitted) ("As a practical matter, while the views of the circuits differ [regarding appellate review of transfer orders], on the whole the net results are similar. All circuits have been extremely reluctant to find an abuse of discretion by the district court, and thus in the great bulk of cases involving district court discretion the prerogative writ has been dismissed or denied"); 9 *id.* at ¶ 110.13[6], at 175. Indeed, while petitioner struggles to show that there is a difference in the circuits' willingness to grant writs of mandamus to override transfer orders, he demonstrates principally that it is very difficult to succeed anywhere and that, by his own account, he lost in a circuit with a relatively liberal standard. See *Pacific Car & Foundry Co.* v. *Pence, supra; Varsic* v. *United States District Court*, 607 F.2d 245, 251-252 (9th Cir. 1979) (one of the few cases where mandamus has been granted to override a transfer order, there under 28 U.S.C. 1406(a)).

Petitioner also seems (Pet. 19-22, 26-29) to assert a due process right to appellate review of transfer orders. He gives no basis for this assertion, however.

Here, moreover, the court of appeals said explicitly that the district court had not abused its discretion (Pet. App. A4-A5). Under the circumstances of this case, then, no court would have granted a writ of mandamus.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

DOJ-1986-02